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## **‘A man of bad character has not so much to lose’: Truth as a defence in the South African law of defamation**

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## **Abstract**

This paper examines, from a historical and comparative perspective, the role of truth in the South African law of defamation. In order to understand to what extent the law of South Africa might represent a mixture of civilian and common-law thinking, it first sets out the viewpoint of, on the one hand, Roman and Roman-Dutch law and, on the other hand, English law. Against this background, the dominant position of South African law appears avowedly civilian, a stand explained by the fact that the South African law of defamation really is a law of verbal insults, as in Rome, rather than a law of injuries to deserved reputation, as in England. However, an interesting dissident strand in favour of the sufficiency of truth can be seen to exist in the background, which is explored. This dissenting strand is certainly English in substance, but this does not entail that it has English roots.

## **Keywords**

Defamation, verbal injuries, truth, veritas, public benefit, South African law, actio iniuriarum

## **‘A man of bad character has not so much to lose’: Truth as a defence in the South African law of defamation**

**Eric Descheemaeker<sup>1</sup>**

### **I INTRODUCTION**

[452] Whether the truth of a statement lowering the estimation of the person to whom it refers in the eyes of others exonerates the defendant in an action for defamation – in other words, whether *veritas convicii excusat* –<sup>2</sup> is a question that, from a comparative perspective, has attracted ferociously polarised answers. There is no agreement on this point between legal systems; no agreement (and often little willingness to agree to disagree) among scholars as to what the law should be; in fact, there is a surprising degree of uncertainty in some jurisdictions as to what the law actually says on the issue.

Does ‘the truth excuse the defamation’? At a very high level of generality, it is fair to say that the position of the common-law tradition has consistently been to consider that, in civil actions,<sup>3</sup> the truthful character of a defamatory – i.e., in the categories of the common law, slanderous or libellous – statement justifies its utterance. As counsel for the defendant already put it in a 13<sup>th</sup> century case before an English local court, ‘*veritas non est defamatio*’.<sup>4</sup> On the other hand, the Roman-law tradition – where the civil redress for defamatory statements developed and, at least for a long time, continued to exist within the wider context of the law of *iniuria*, that is to say, of insults [453] – never accepted truth as a defence in and by itself. If truth was to be relevant, it would normally be in conjunction with another factor – for example, an element of public benefit – or as evidence of something else which would be what in fact mattered – in particular, the absence of the required mental state. In spite of all manner of low-level complications, and even though Romanist learning always existed in the background as English law developed into a separate legal tradition, a clear dividing line can

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<sup>1</sup> Maîtrise DEA (Sorbonne), LLM (London) DPhil (Oxford). I am grateful to Helen Scott (University of Cape Town) for her ongoing help in sharpening my thoughts on the issue and for the use of her notes prepared for the BCL course on the Roman Law of Delict. Two anonymous referees saved me from further errors.

<sup>2</sup> This is the traditional Scottish formulation (imported from canon law): see eg *Hamilton v Rutherford* (1771) Mor 13924, Hailes 439. Convicium is used here in the general sense of slander or defamatory words, not in the technical sense of a convicium in Roman law (on which see below, note 11).

<sup>3</sup> Criminal defamation is excluded from the scope of this study because it is obvious – and undisputed – that the law of criminal defamation is pursuing different objectives from the civil law. It is therefore unsurprising, but rather uninteresting, that in all legal systems it has tended to have a conflicting position on the plea of *veritas* (see below, note 34).

<sup>4</sup> 2 Selden Society 82 (1294). The record has the word spelt ‘defamacio’. On the significance of this statement in terms of protected interests, see below, 11.

be observed on this question between what English-language scholarship calls the ‘civil law’ and the ‘common law’.

For this reason, the examination of so-called ‘mixed’ legal systems, where elements of both traditions combined to give rise to the modern law, is almost bound to be of considerable interest: confronted with two conflicting positions on truth – justification in itself or not – within two analytical framework that did not easily fit with one another – the law of slander and libel on the one hand, the *actio iniuriarum* on the other – how would these legal systems develop and what coherence of their own, if any, would they reach? This is what this paper sets out to explore in the context of one of the two leading uncoded mixed jurisdictions: South Africa. Because the main purpose is to analyse the position of the modern law against the background of its two possible sources, however, the first half of the paper will be devoted to setting out the position of Roman law and English law. While the latter is relatively straightforward, the former is a matter of significant controversy and will need to be examined in more detail. The sort of ‘mixture’, if indeed it was a mixture, which South African law has operated, will then be considered.

## II THE BACKGROUND: ROMAN LAW AND ENGLISH LAW

### (1) *Roman law*

#### (a) *The analytical framework*

Even though the expression has commonly been employed, perhaps most famously by Daube,<sup>5</sup> there is nothing self-evident in speaking of a ‘Roman law of defamation’. *Prima facie*, what we observe if we approach Roman law in its mature, classical age on its own terms and look for a functional equivalent to what we would call a law of defamation is the civil wrong of *iniuria*<sup>6</sup> (complemented by the legal institution known as *libellus famosus*, which can be ignored for the present purposes because it would have led, in [454] modern

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<sup>5</sup> D Daube ‘*Ne quid infamandi causa fiat*. The Roman Law of Defamation’ in D Daube *Collected Studies in Roman Law* (1991) 465 (originally published in *Atti del Congresso di Verona 1948* vol 3 (1951) 413). See also M de Villiers ‘The Roman Law of Defamation’ (1900) 17 *Cape LJ* 245; id ‘The Roman Law of Defamation’ (1918) 34 *LQR* 412.

<sup>6</sup> Literally, ‘*iniuria*’ means ‘not-right’, ‘wrong’, ‘unlawful conduct’, ‘injustice’; in its specialised sense of ‘*contumelia*’ (D.47.10.1 pr.; J.4.4 pr.), it has been variously translated with ‘outrage’, ‘insult’ or ‘contempt’.

terms, to a purely criminal response of the law.) In the classical law, iniuria had grown to such an extent from its – disputed – origins as *prima facie* to encompass any act whatever of the defendant which showed a contumelious disregard for the claimant, thereby injuring his feelings. A crucial ingredient of liability, which was implicit in the praetor's Edict but was brought to the fore by legal writers, would have been the mental element which came to be known as 'animus iniuriandi' – the term itself is post-classical –, <sup>7</sup> an undefined and difficult concept which we can provisionally translate with 'intention to insult'. <sup>8</sup>

The question of the interests which iniuria protected as a wrong permeates this paper and will need to be returned to; but it is useful to mention at the outset Ulpian's statement according to which iniuria consisted in an injury to either corpus (physical integrity), fama (good name, reputation, fame, renown) or dignitas (dignity, worth, status, standing). <sup>9</sup> If we accept that the law of defamation is the law that pertains to injuries to reputation, which is a proposition that would be readily accepted in the context of both South African and English law, what we then have as we approach Roman law on its own terms is a law of defamation which operates under the general heading of a law of insults (iniuriae). This section of the law of iniuria which dealt with injuries to fama – in other words, the 'Roman law of defamation' – was the subject-matter of a specialised edict, known by its opening words as the edict 'ne quid infamandi causa fiat', in short 'ne quid' (literally, 'let nothing be done to bring disgrace [upon another]'). <sup>10,11</sup> The relationship between the special edict dealing with injuries to reputation and the general edict on iniuriae is a matter of ongoing controversy; but there is no need for us to take a stance here since it is not disputed that, by the classical age at the latest, the special edict operated as an island of liability existing within the wider context of the delict of iniuria, itself a general wrong unified by the concept of contumelia. For the [455] present purpose,

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<sup>7</sup> F Schulz *Classical Roman Law* (1951) 597; cf R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 1059–61. For instance, in D.47.10.3.1, Ulpian speaks alternatively of 'dolus' and 'affectus facientis'. An interesting terminological overview is provided in C F Amerasinghe *Defamation and Other Aspects of the Actio Iniuriarum in Roman-Dutch Law* (c 1968) 342.

<sup>8</sup> On animus, see below, 6.

<sup>9</sup> D.47.10.1.2 (Ulpian, 56 Edict).

<sup>10</sup> For the wording of the edict and the pattern formula attached to it, see D.47.10.15.25 (Ulpian, 77 Edict); *Collatio* 2.6.5, D Daube op cit note 5 at 465; O Lenel *Das Edictum perpetuum* 3 ed (1927) 401. On the relationship with the general edict, see D.47.10.15.26 (Ulpian, 77 Edict); H Scott 'Omnes unius aestimemus assis: A Note on Liability for Defamation in Catullus V' (2006) 3 *Roman Legal Tradition* 95 at 100–104.

<sup>11</sup> The edict on convicium – or public clamour – would not have been directly relevant because, even though the words it visited would often be defamatory, it did not matter whether they were or not, because the gist of the action lay in their clamorous, rather than defamatory, character: see D.47.10.15.5 (Ulpian, 77 Edict: ad infamiam vel invidiam). It seems certain that, by the classical age, convicium was regarded as a form of iniuria (D.47.10.15.4; convicii are dealt with within title 47.10 in the Digest, headed 'de iniuriis et libellis famosus').

therefore, the Roman law of defamation can be taken to mean the law secreted under the heading of the edict ne quid.

(b) *The defence of truth*

In an action for iniuria under the edict ne quid, would the fact that the incrimination carried by the contumelious words, or acts, complained of was in actuality true have been relevant to the outcome of the action; and if so how? This question has been and remains vexed. Whatever answer is provided will typically draw from a combination of two elements: first, an exegesis of D.47.10.18 pr. (from Paul, 55 Edict), the only prima facie relevant fragment in the sources;<sup>12</sup> second, deductions made from a priori considerations pertaining to the law of iniuria or of defamation.

The Paulian snippet reads as follows:

Eum, qui nocentem infamavit, non esse bonum aequum ob eam rem condemnari: peccata enim nocentium nota esse et oportere et expedire.

It is not right and just that any one who has defamed a guilty person should on that account be condemned; for it is both proper and expedient that the misdeeds of delinquents should be known.<sup>13</sup>

*Interpretations.* How is this to be understood? The fragment has given rise to a considerable number of conflicting interpretations both during the ius commune and on the part of modern Roman scholars. A number of English scholars, perhaps overly prompt to assume identity with the position of the common law, read in it a general defence of veritas;<sup>14</sup> other writers,

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<sup>12</sup> On Codex 9.35.5, see below, 32.

<sup>13</sup> Translation Melius de Villiers cited in J Burchell *The Law of Defamation in South Africa* (1985) 206. Compare other translations: 'It is not right or just to condemn anyone for bringing a guilty person into disrepute, for it is necessary and proper for the offences of guilty persons to be known' (translation Kolbert cited in Burchell op cit at 206); 'It would not be right and proper that a person should be condemned for putting to shame a wrongdoer; for the sins of those who do wrong should be noted and noised abroad' (translation Pennsylvania Digest).

<sup>14</sup> Eg J Crook *Law and Life of Rome* (1984) 253, describing this position as 'customary' (although he himself opposed it); W W Buckland *The Main Institutions of Roman Private Law* (1931) 338; W Hunter *A Systematic and Historical Exposition of Roman Law in the Order of a Code* 4 ed (1903) 149 (cited by the minority in *Preller v Schultz* 10 Cape LJ 175 at 176, on which see below, 23). Outside English writers, see eg Amerasinghe op cit note 7 at 82 and 340 (although the author recognised a possibility that the defence of truth might be lost).

probably reading back what became the dominant interpretation of the *ius commune*, took it as evidence of the fact that truth for the public benefit justified, but not truth simpliciter.<sup>15</sup> In turn, the nature of this ‘public benefit’ – however that element [456] be phrased – could be given a wide variety of interpretations.<sup>16</sup> If we ignore the rare, and obviously ill-thought, suggestion that truth would never be relevant,<sup>17</sup> we find at the most restrictive end of the spectrum Grotius, for whom the only situation where the truth could be spoken even though it was *prima facie* defamatory of another was ‘when information is given to the authorities with a view to the punishment of crime’.<sup>18</sup> More mainstream was the interpretation according to which wrongdoers, in the sense of criminals (the meaning ascribed to ‘nocentes’ in Paul),<sup>19</sup> could be spoken the truth about – even if they had already been convicted – but not those who had committed a non-criminal, possibly non-blameworthy act, or whose faulty character or physique, rather than actions, was the subject-matter of the disputed words. At the other end of the spectrum, Matthaeus might have been the most favourably disposed towards truth, even though he evidently required more than truth simpliciter to justify.<sup>20</sup> There is no need to examine these interpretations in detail here, because it suffices for our purpose to note that almost all revolved around the need for an element of good for the community over and above truth to justify the author of the injurious statement, the few others requiring the absence of *animus iniuriandi*.

*A hypothesis.* This paper not being concerned primarily with Roman law, I will state my own understanding as a hypothesis, without trying to demonstrate it systematically – which, given the textual evidence, might not be possible at all. This understanding is that the latter above view, namely, that only the absence of *animus* displaced the *prima facie* finding of liability

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<sup>15</sup> Eg T Starkie *A Treatise on the Law of Slander and Libel, and Incidentally of Malicious Prosecutions* 2 ed vol 1 (1830) xxxv, Lord MacKenzie *Studies in Roman Law* 6 ed (1886) 262 (cited by minority in *Preller v Schultz* op cit note 14); and see note below for Roman-Dutch and Roman-Scotch authorities.

<sup>16</sup> For an overview of (mostly Roman-Scotch) writers from the *ius commune*, see J Blackie ‘Defamation’ in K Reid and R Zimmermann (eds) *A History of Private Law in Scotland* vol 2 (2000) 666–8; for Roman-Dutch writers, see M de Villiers *The Roman and Roman-Dutch Law of Injuries* (1899) 105–6 and 119 (the latter from *Preller v Schulz* op cit note 14); also B Ranchod *Foundations of the South African Law of Defamation* (1972) 49–53, 84–9; *Sparks v Hart* (1833) 3 Menz 3 at 4–5.

<sup>17</sup> Blackie op cit note 16 at 667.

<sup>18</sup> H Grotius *The Jurisprudence of Holland* (tr R W Lee) (1926) 481. This can be regarded, in modern English terms, as a form of absolute privilege.

<sup>19</sup> ‘Nocens’ was an untechnical Latin term. Rather like ‘guilty’ in English, it could be used in a narrower sense to mean guilty of a legal offence (like one is ‘guilty’ of murder or reckless driving), or in a wider sense to denote responsibility for any negatively connoted behaviour or even non-behavioural feature (like one might be ‘guilty’ of having a poor sense of fashion).

<sup>20</sup> A Matthaeus *On Crimes. A Commentary on Books XLVII and XLVIII of the Digest* (ed and tr M L Hewett and B C Stoop) vol 1 (1987) esp at 109.



prompted by defamatory conduct, represents the position of the classical Roman law of defamation. On this reading, truth itself was irrelevant to an action under the edict *ne quid*. If the incrimination made was defamatory – in the sense of impinging upon the plaintiff's *fama*, i.e. his reputation in the eyes of others – and if they were spoken with an intention to insult the [457] plaintiff, then the defendant would be liable. On the other hand, whenever no such *animus* was found, the defendant would escape liability because the injury would not be *contumeliosus* and thus not wrongful.

However, truth, while in itself transparent, might have become indirectly relevant insofar as it would have contributed to negate the element of malice. The two limbs of this proposition need to be considered in some detail. First, the presence of truth is not sufficient evidence of the lack of *animus iniuriandi* for, clearly, one might speak the truth<sup>21</sup> with or without an intent to insult the claimant – that is to say, an evil intention towards him. This evil intent seems to be what the sources describe, in a fragmentary way, by ‘*animus iniuriandi*’ (or rather whatever expression is used to speak of the mental element of the wrong of *iniuria*): it is not a state of consciousness vis-à-vis the infliction of an injury to the plaintiff's reputation – which in modern English terms we might call ‘malice-in-law’; but neither is it the motive behind the infliction of the injury, at least not in the sense of the ‘ultimate object sought to be attained by the act’<sup>22</sup> (which, in both Roman and English law, has consistently been regarded as irrelevant); rather, it is something close to the ‘malice-in-fact’ of English law, a consciousness of wrongfulness, an ill-will towards the claimant which, in the context of *iniuria*, has been described by Birks as ‘*hubris*’, i.e. ‘an over-confident exaltation of the self ... as where one person has so high a view of his own importance as to allow himself to commit acts of wanton violence or other outrages upon another’.<sup>23</sup>

Second, while truth is not sufficient to prove the absence of such *hubris*, it is clearly relevant to the enquiry. In order to unpack this, it might be easiest to reason from first principles on defamatory but true words. (By ‘true’, in order not to bring in difficulties which the Romans did not address, I will mean both objectively true and believed to be true; and by ‘defamatory’, I mean which is liable to injure the *fama* of the person to whom they refer – whether that reputation be merited or not.) To take a simple example, the claimant who has been called a ‘thief’ by the defendant, thereby injuring his *fama*, is in fact a thief, and is so

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<sup>21</sup> Or what is believed to be true: the Roman sources did not investigate any possible discrepancy between the two.

<sup>22</sup> M de Villiers ‘Malice in the English and Roman Law of Defamation’ (1901) 18 *LQR* 388 at 388.

<sup>23</sup> P Birks ‘Harassment and Hubris: The Right to an Equality of Respect’ (1997) 32 *Irish Jurist (NS)* 1 at 8.

believed to be by the defendant. In the abstract, this situation can be analysed in a number of different ways. The first issue is whether the plaintiff-thief has suffered any *prima facie* actionable loss or, to put the same question differently, whether a legally protected interest of his has been encroached upon. Here, some English lawyers might answer to the negative, on the basis that what the law protects really is deserved reputation. The ‘thief’ who is a thief has suffered no injury in the sense of the [458] violation of a right of his: this is the end of the story as far as his endeavour to seek redress in the law of defamation is concerned.

This, however, is not the dominant approach of the common law, which would rather say that an injury – to reputation in the wider sense – has indeed been suffered, but that it was justified by the truth of the incrimination. It would not have been the approach of Roman law either, where *fama* transparently meant (as ‘reputation’ does in ordinary parlance) a good esteem in the eyes of others, whether that good esteem be deserved or not. There is, then, a *prima facie* injury. However, it seems clear that no legal system could maintain that true words are always actionable if they injure reputation in that wider sense: this would conflict too evidently with the good of the community.<sup>24</sup> At best, it might want to say that they are always *prima facie* actionable; but defences must be available, which can reverse this provisional finding of liability. How, then, do we define these defences? This can be done either in terms of exclusion of unlawfulness or exclusion of fault (in the sense of a mental state): here, it is convenient to follow Burchell’s terminology and call the former a ‘justification’ and the latter an ‘excuse’.<sup>25</sup>

Intuitively, a legal system which does not accept that anyone could always call a thief a ‘thief’ and get away with it – because (as the New South Wales Law Reform Commission would put it many centuries later in perhaps the most succinct way) ‘gratuitous destruction of reputation is wrong, even if the matter published is true’ –<sup>26</sup> such a system will insist that there should exist a sufficient common or greater good, served or caused or achieved by the attack, to outweigh and thus ‘justify’ the harm suffered. In other words, to follow the above

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<sup>24</sup> On the other hand, it is tenable for a legal system to say that true words are never actionable in defamation. But this does not mean that they will not be actionable as something else. Indeed, it is difficult to see how a legal system, even on the non-criminal side of the law, could justify the speaking of true words in all circumstances. Yet it is certainly possible, as the example of English law until 1974 show, to say that they never give rise to an action for the infringement of reputation, ie ‘in defamation’. Whether this is just is an altogether separate question that need not be addressed here.

<sup>25</sup> Burchell *op cit* note 13 at 34. Naturally, ‘justification’ must not be confused in that context with the specific defence of truth or truth for the public benefit.

<sup>26</sup> New South Wales Law Reform Commission, *Defamation* (Report 11) (1971) § 64. This is the one leading argument that the anti-veritas cohort has put forward over centuries.

phrasing, the attack should not be ‘gratuitous’. What this exactly entails might be difficult to flesh out; but the basic idea is clear and intuitive enough.

In turn, this requirement that the attack should not be gratuitous can be cast in two different ways which, at least in the great majority of cases, will overlap: it can be phrased in terms of an element of public benefit – whatever the precise words used and meaning ascribed to them – or in terms of a mental disposition on the defendant’s part: the attack is not gratuitous either because it serves a good purpose or because it is not [459] motivated by sheer malice. Following the above terminology, the former relates to a justification (objective circumstances excluding unlawfulness) and the latter to an excuse (subjective mental state excluding fault).

To a large extent, one is the reverse side of the other. Thus, the defendant might have called the plaintiff a ‘thief’ because he wanted to bring him to a deserved punishment, or to protect the community against further wrongdoing on his part, or otherwise serve the good of the commonwealth; or he might have done it with no such good in mind. If he did not, then it is very likely, if not almost certain, that he will have been actuated by ill-will against the claimant, i.e. an intention to insult him or, to phrase it differently, a positive desire to cause him an injury.<sup>27</sup> This is what the post-classical writers would have called *animus iniuriandi*. Although the correspondence is not perfect – for it still possible to speak truth that is in the public interest with spiteful intent and conversely to say, without any intention to insult, something which is true yet not objectively in the public interest – still, there is such a degree of overlap between ‘truth for the public benefit’ (or ‘in the public interest’: an objective defence negating unlawfulness) and lack of wrongful intent (a subjective defence negating fault) that it is very easy to see how, as far as issues of truth or lack thereof are concerned, the two could be used almost interchangeably by writers. In most cases, they would yield the same result.

*A hypothesis (continued): the position of Roman law.* As was seen, most authors of the *ius commune* reasoned in terms of an objective defence of public benefit negating unlawfulness. The rebuttal of *animus iniuriandi*, when it was mentioned, would simply be the basis on which truth for the public benefit was justified. *Animus iniuriandi* having been pushed into the background, the debate would then move on to the definition of that element of public good.

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<sup>27</sup> Here, I follow De Villiers’ terminology and distinguish desire from, on the one hand, will or intention and, on the other hand, motive. See De Villiers *op cit* note 22 at 388–9.

But reading this crystallisation back into the Roman law appears to be anachronistic and does not make sense within the context of the edict *ne quid*. To understand this, we need to recognise the specificity of that edict. Contrary to the other specialized edicts on *iniuria*, such as *convicium* or *de adtemptata pudicitia*, *ne quid* did not visit a specific type of conduct: *prima facie* any act, whether words or other conduct, can bring disgrace to another. As Daube put it, ‘a man may undermine another man’s reputation by an immense variety of means. He may do it by a straightforward statement. But he may also do it by oblique remarks, or even without any remarks’.<sup>28</sup> This raised specific problems when it came to the delineation of wrongful conduct. Self-evidently, not every conduct which infringes one of the interests protected by *iniuria* (whether through the general or a specialized [460] edict) should be actionable. Just as not every public clamour or attempt to seduce should be characterized as wrongful, so not every conduct which brings disgrace upon another ought to be actionable. In the case of *convicium* or *de adtemptata pudicitia*, the way the praetor dealt with this question was by limiting actionability to such facts that were described as ‘contrary to public morals’: *adversus* (or *contra*) *bonos mores*.<sup>29</sup> The criterion was objective: only conduct that crossed the line of socially unacceptable conduct gave rise to an action. The objectiveness of the criterion would not have caused practical difficulties, because the specificity of the conduct visited by the edicts would have almost invariably entailed consciousness of wrongfulness on the defendant’s part.

While theoretically possible, adopting such an approach in the case of defamatory incriminations under the edict *ne quid* would have had, given the sheer width of potentially liability-creating conduct, the practical and highly undesirable effect of turning the judge into an all-around censor of social behaviour.<sup>30</sup> In modern terms, we might want to say that this would have caused a considerable problem of legal certainty. Daube’s argument, which seems entirely right, is that the praetor resolved this difficulty by using the defendant’s intention as the means to control liability: actionability would turn on the latter’s intention to bring disgrace upon the plaintiff – *infamandi causa*. He would be liable if, but only if, it had been his purpose in acting to infringe the *fama* of the defendant. In other words, if Daube is right, what would come to be known as *animus iniuriandi* emerged in the context of *ne quid* as a control mechanism alternative to public morals to separate out wrongful from non-wrongful

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<sup>28</sup> Daube op cit note 5 at 468.

<sup>29</sup> See, for *convicium*, D.47.10.15.2 (Ulpian, 77 Edict); for *de adtemptata pudicitia*, Lenel op cit note 10 at 400.

<sup>30</sup> Daube op cit note 5 at 468.

behaviour. (The general edict cannot be straightforwardly reconstructed as having followed one or the other approach; but Helen Scott's view that the surviving texts show a tension between the objective *boni mores* as an older criterion of liability and *animus iniuriandi* as a later, subjective, criterion is both plausible and attractive.)

If it is true that *animus iniuriandi* was an alternative to *boni mores* as a control mechanism in the context of the edict *ne quid* – which fits very well with the available textual evidence, writers never speaking of ‘public morals’ in the context of passages clearly or even possibly referring to that edict –, <sup>31</sup> it follows that liability in the Roman law of defamation would have revolved exclusively around the subjective criterion of intention to insult: <sup>32</sup> *animus iniuriandi* would have invariably been an ingredient of liability and, provided [461] that the conduct complained of was objectively defamatory, only the absence of such an intention to cause the *iniuria* to the claimant would have relieved the defendant of his liability. Truth was thus irrelevant in itself, although indirectly relevant insofar as it would help evidence that the defendant's purpose in making the incrimination had not been to insult the plaintiff but, for instance, to make the ‘misdeed of delinquents ... known’. If this is right, then the crystallization of (subjective) *animus* into an (objective) defence of ‘truth for the public benefit’ would have been a post-Roman – and imperfectly accurate – ‘objectivization’ of the classical position.

## (2) *English law*

The position of English law can be dealt with more succinctly, in part because there are sufficient records to remove most elements of speculation, and also because it has already been dealt with in other fora. <sup>33</sup> The English (civil) law of defamation is the reunion, in mathematical terms, of the two causes of action known as slander – the action of trespass upon the case for words – and libel. Whereas the law of criminal libel, like the Roman law of *libelli famosi* (at least until the time of Justinian), did not recognise truth as an exculpating

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<sup>31</sup> I am following the list of texts provided, in three groups, in Daube *op cit* note 5 at 471–84.

<sup>32</sup> This position is strengthened by C.9.35.5, which applied to *convicium* not *iniuria famae*, but clearly states that absence of any intention to insult exculpated the defendant from liability (‘*Si non convicii consilio te aliquid iniuriosum dixisse probare potes, fides veri a calumnia te defendit*’). Contra De Villiers *op cit* note 16 at 87.

<sup>33</sup> Including, most recently, my own paper: E Descheemaeker ‘“*Veritas non est defamatio*”? Truth as a Defence in the Law of Defamation’ (2011) 31 *Legal Studies* 1.

factor –<sup>34</sup> which is unsurprising because it exists to protect different, public, interests, which are not concerned with the falsity of the statement but rather its disruptive effect on the fabric of society – the law of civil libel and of slander has, by and large, always accepted that truth was a defence in and by itself. This position was best encapsulated in the modern age by Littledale J's statement in *M'Pherson v Daniels* in 1829 – 'the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess' –;<sup>35</sup> but it goes back all the way to the very beginnings of the action of slander.<sup>36</sup> Doctrinally, as alluded to, there are two ways of understanding the position of English law: one is that defamation is an attack on reputation, i.e. the esteem – deemed by default to be good – in which the plaintiff is held in the community, but the truth of the statement provides a good justification that rebuts the prima facie finding of liability; the other (which I favour), that defamation is by definition an attack on deserved reputation and, consequently, that a defamatory statement is by nature false. On this view, a true statement cannot, by construction, be defamatory; it therefore does not need to be 'excused': veritas non est defamatio.

To this dominant thread has echoed, through the centuries, a 'dissident' voice. For the most part, this dissent has been de lege ferenda. Truth, some [462] have argued, ought not to always be a defence because, again, 'gratuitous destruction of reputation is wrong'.<sup>37</sup> In particular, individuals ought to be allowed to live down a life of past wrongdoing without the fear of their old offences being raked up, typically for malicious – even blackmailing – purposes.<sup>38</sup> De lege lata, the argument has not been met with much success on the civil side of the law; but it can be observed as early as 1533 in the position of Fitzjames CJ in *Legat v Bull* –<sup>39</sup> the one case in the history of English law where the defence of veritas was actually

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<sup>34</sup> In short, truth was – at least on the face of the record – irrelevant until 1843; since then, 'truth in the public benefit' has been a valid defence (Libel Act 1843, s 6). See Law Commission, *Working Paper No. 84: Criminal Libel* (1982) §§ 2.1–2.22.

<sup>35</sup> *M'Pherson v Daniels* (1829) 10 B & C 263, 109 ER 448.

<sup>36</sup> See *Reymond v Lord Fitzwauter* (King's Bench, 6 October 1521), 2 Spelman Reports 2; *Legat v Bull* (King's Bench, Trinity Term 1533), 1 Spelman Reports 6.

<sup>37</sup> Above, 7.

<sup>38</sup> For the Australian story, see P Mitchell 'The Foundations of Australian Defamation Law' (2006) 28 Sydney LR (2006) 477 at 492-5. A highly specific context existed in New South Wales, marked by the existence of newspapers which specialized in blackmailing settlers (of which a significant proportion would have consisted of former convicts) with threats to reveal their sinful past in print unless they paid up. For an echo of this view in a South African context, see below, 20 and 26.

<sup>39</sup> Op cit note 36 at 6: an imputation of crime, even if true, could only be made 'in the interest of justice'. Compare the position of Fitzherbert J: 'if it is true, he [the defendant] could well speak it where and when he pleases' (ibid).

disputed on the Bench. It resurfaced during the discussion of the Libel Bill 1791<sup>40</sup> and then of what would become the Libel Act 1843,<sup>41</sup> finally to find partial recognition in s 8(5) of the Rehabilitation of Offenders Act 1974,<sup>42</sup> which removes the defence of truth in defamation actions when the statement complained of was the malicious publication of a past conviction now regarded as ‘spent’.<sup>43</sup> To date, the 1974 Act remains the one, narrow, exception to the otherwise firmly established rule that, as far as civil actions for defamation in English law are concerned, *veritas convicii excusat*.

I have argued elsewhere that this departure from the principle is an oblique attempt on the part of English law to protect, not reputation, but privacy (in Roman terms, a species of *dignitas*).<sup>44</sup> In a legal system where there is no direct protection of that interest, any protection will have to be indirect; and one ‘solution’ English law has adopted has been to exploit an action which, according to its own rhetoric, is geared at the protection of reputation. This is one example, among others, of how the English law of defamation has become an embryo of *actio iniuriarum* in its own right – a process that I have argued is wrong for several reasons.<sup>45</sup> One of them can be seen in its effect on truth. As a matter of fact, it seems an analytical necessity to say that a [463] true statement cannot impinge on someone’s deserved reputation. On the other hand, if what is complained of is that the statement violated the defendant’s dignity, then truth has to be irrelevant: broadcasting to the world the serological status of an HIV+ person or taunting them for their poverty or hunch back is – if one accepts that this is wrong – wrong regardless of truth; arguably it is in fact because these statements are true that they are wrong (if they were false, they would still be wrong, but for a completely different reason).

It is thus relatively easy to understand how an action that aims to protect both *fama* and *dignitas*, as the Roman *actio iniuriarum* did and, to a slight extent, the English action on defamation does, will end up having a defence of truth set somewhere between the two extremes of ‘*veritas (semper) excusat*’ and ‘*veritas (semper) non excusat*’ – ‘truth (always) excuses’ and ‘truth (always) does not excuse’ – as it strives to protect interests that are pulling

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<sup>40</sup> Descheemaeker op cit note 33 at 12-13.

<sup>41</sup> Descheemaeker op cit note 33 at 8.

<sup>42</sup> Descheemaeker op cit note 33 at 7.

<sup>43</sup> Rehabilitation of Offenders Act (1974 c 53), s 8(5): ‘A defendant in any [defamation] action shall not ... be entitled to rely upon the defence of justification if the publication is proved to have been made with malice’. The term ‘malice’ is not defined by the Act; but Lord Diplock (who introduced the word in the Bill) made it clear during the preparatory works that he meant it in the sense defined by himself earlier the same year in *Horrocks v Lowe* [1975] AC 135 at 149 (HL Deb 24 July 1974 vol 353 cc1806-52 at 1812).

<sup>44</sup> Descheemaeker op cit note 33 at 17ff.

<sup>45</sup> Descheemaeker op cit note 33 at 18-19.

in opposite directions in this respect: something like truth for the public benefit or truth unless it is malicious. Arguably, such a system ends up losing on both counts, as this sort of compromise mixes two logics and is left with none of its own. If this is true, it follows that the protection of these conflicting interests must be left to separate causes of action. (It might even be the case – but this is not the place to argue this point – that, as English law did in fact appear to believe until comparatively recently, there should be no direct legal protection of privacy at all: only of deserved reputation, with its necessary corollary, a defence of veritas.)

### III SOUTH AFRICAN LAW AT THE CROSSROADS?

We are now in a position to turn our attention to the mixed legal system of South Africa to see whether, and if so to what extent, it amounts on this point to a ‘mixture’ of Roman and English law. To cut a long but well-known story short, South African law was originally Roman-Dutch law as brought over from Europe by the Dutch colonists: a mixture of Roman learning, as revisited by medieval commentators, and Dutch customs. The Dutch were later defeated – in several phases – by the British, who recognised the validity by default of the substantive Roman-Dutch law but anglicised procedure and made English the language of the administration of justice. The presence of English learning and English materials, as well as the fact that the English tongue utilises words which correspond to concepts already employed by the common law of England and Wales, meant that it was all but inevitable that at least some infiltration of English law would happen at the substantive level as well. The avowed aim of many in the legal community was in fact that there would be more than ‘some’ of it.<sup>46</sup> If one thing has to strike the outside observer of South African law on the particular point under scrutiny in this paper, it is *how little* of it did in fact happen. The [464] South African law of defamation might have been ‘the focal point of the purist-pragmatist controversy’;<sup>47</sup> but on this point it remained avowedly Roman-Dutch.

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<sup>46</sup> E Fagan ‘Roman-Dutch Law in its South-African Historical Context’ in R Zimmermann and D Visser (eds) *Southern Cross* (1996) Ch 1.

<sup>47</sup> H J Erasmus, ‘The Interaction of Substantive Law and Procedure’ in R Zimmermann and D Visser (eds) *Southern Cross* (1996), 157–60. By ‘purism’ (on which see E Fagan op cit note 46 at 60–4) is meant the endeavour on the part of some, especially Afrikaans-speaking scholars and judges, to root out the ‘impure’ English additions to the Roman-Dutch system. By ‘pragmatism’ is meant the willingness to draw from English sources, regarded as more suited on the whole to the modern world, whenever the need was felt to depart from the customary rules of Roman-Dutch law.



(1) *The structural framework*

To the present day, the *actio iniuriarum* remains a category within South African law. Both courts and legal scholars reason in terms of *iniuria*. However, under the combined influence of Grotius – who built upon Roman scholarship to bring to the fore the various interests protected by the law, and identified ‘wrongs against honour’ as a separate category – and of the English law of slander and libel, South African law also thinks in terms of the wrong of defamation (*laster* in Afrikaans). But defamation, even though it is routinely regarded as a law unto itself that can be treated as a separate entity, is known to exist within the wider context of the *actio iniuriarum*: similarly to Roman law, it is *iniuria* as it applies – if possibly with its own specific rules – to reputation (*eer*). This has important consequences in that, in particular, *animus iniuriandi* remains in ordinary cases a requirement for liability. Although its necessity was strongly attacked, in particular over the first half of the twentieth century (at the same time as English law moved towards a paradigm of strict liability), it never disappeared and – whatever exactly *animus* is taken to mean –<sup>48</sup> it has been clear again for half a century that it is not a hollow fiction and it is still an ingredient of liability: there can normally be no liability for defamation-*iniuria* in South African law without *animus iniuriandi*.<sup>49</sup> This *animus* is not uncommonly called ‘malice’, although the literature abounds with warnings to the effect that the *animus* of Roman-Dutch law is different from the malice of English defamation law.

(2) *Truth for the public benefit*

The reliance of South African defamation law on an action that, in its self-understanding, aims to protect dignity alongside reputation is unsurprisingly reflected by a defence of truth that meets somewhere in between the two extremes described above. The settled position of South African law is [465] that the defendant can escape liability in an action on defamation (*iniuria famae*) if, but only if,<sup>50</sup> the words spoken were true and their utterance was ‘for the public benefit’. This element of public benefit is occasionally called ‘public interest’, even

<sup>48</sup> See, most recently, the important case of *Le Roux v Dey* [2010] ZASCA 41.

<sup>49</sup> Eg Jonathan Burchell ‘The Protection of Personality Rights’ in R Zimmermann and D Visser (eds) *Southern Cross* (1996) 640–4. Mention was made of ‘ordinary cases’ because, in the context of injuries to *fama*, an exception was carved out for distributors of published material, including the press and other media (see Burchell *op cit* note 13 at 175–7). Exceptions also exist in other areas of the *actio iniuriarum* (see J Neethling, J M Potgieter and P J Visser *Neethling’s Law of Personality* 2 ed (2005) 58–9).

<sup>50</sup> Insofar as the defence of justification or truth is concerned; there are naturally other defences available.

though it is accepted that it is different from the notion of public interest as it applies to the defence of fair comment.

(a) *The position of courts*

(i) *Before the Union of 1910*

If we look at the foundational period of South African law in the 1827-1910 period<sup>51</sup> (a period during which there was virtually no home-grown scholarship apart from court judgments),<sup>52</sup> we find that – subject to the emergence at the end of the century of a ‘dissenting’ strand, to which we shall return – the defence was incorporated smoothly from Roman-Dutch law into the law of the land. Naturally, until the establishment of a Union of South Africa, there was technically no ‘South African’ law, but laws specific to the different polities established on the territory, whether under British or Boer control: the Cape Colony, Natal, Transvaal and Orange. It would however be misleading to grant equal consideration to these: the dominant force was unquestionably the Cape of Good Hope, where a Supreme Court had been established in 1828. In the absence of any colonial pronouncement, however, Roman-Dutch law applied in all these territories.

*The Cape.* In the Cape Colony, we find the defence of truth for the public benefit already established in *Mackay v Philip* (1830), the first reported case of defamation in the Supreme Court.<sup>53</sup> The phrase ‘public benefit’ (or equivalent) is not used; but the idea appears transparently in the judgment.<sup>54</sup> The reasoning of the court is less transparent, but it does seem to be that truth for the public benefit rebuts the presumption of animus iniuriandi having arisen from the publication of the defamatory words. As to the authority for both propositions – as, indeed, for any other legal proposition in the case – it was Voet’s *Commentary on the Pandects*. Voet’s *Commentary* was a mainstream representative of the Roman-Dutch tradition having identified, and crystallised, the rebuttal of animus iniuriandi in terms of (among other

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<sup>51</sup> 1827 was the publication of the First Charter of Justice, establishing a Supreme Court in the Cape Colony. 1910 saw the fusion of the South African colonies into the Union of South Africa. For a brief historical overview, see R Zimmermann and D Visser, ‘South African Law as a Mixed Legal System’ in *id* *Southern Cross* (1996) 15–19; S D Girvin, ‘The Architects of the Mixed Legal System’ in *ibid* Ch. 3.

<sup>52</sup> Zimmermann & Visser *op cit* note 51 at 19.

<sup>53</sup> *Mackay v Philip* (1830) 1 Menz 455.

<sup>54</sup> At 463.

defences) an objective justification of truth for the public benefit.<sup>55</sup> Paraphrasing Paul [466] closely, Voet (1589–1676) interpreted D.47.10.18 pr. as meaning that he who made an imputation that ‘concerns the well-being of the commonwealth’<sup>56</sup> ought not to be liable, contrary to he whose statement did not concern ‘the interest of the State’ – as when the matter related to an offence already punished or to a ‘natural defect’. This he explicitly justified on the basis that animus is rebutted in the former case but not the latter. The case of *Mackay* thus provides, from the very beginning, a neat summary of the South African experience: one rule – only truth for the public benefit justifies; one basis – the absence of animus iniuriandi; one authority – Voet.

The later case of *Sparks v Hart*<sup>57</sup> complexified but did not alter this basic picture. In that case the issue was actually disputed, and counsel for both parties drew from a wider range of authorities. The party seeking to rely on the defence of veritas convicii excusat called on Grotius and Van Leeuwen as well as Voet, who was interestingly also cited by the opposite party along with Matthaeus, Wissenbach, Van der Keessel and some English authorities (Holt and Chitty). The response of the court was exactly the same as in *Mackay*: veritas only avails where it rebuts the presumption of animus, which entails that an element of public benefit – the phrase is still not used – must be present.

The same question arose anew in *Botha v Brink* (1878).<sup>58</sup> A clearer attempt was made by counsel in that case to establish the defence of veritas in South African law, first by explaining away the Roman-Dutch authorities as being concerned with ‘criminal proceedings’, and then by making an appeal both to English law and to principle, its being ‘inequitable that a person should be punished for speaking the truth’. In response, John de Villiers CJ returned to the Roman-Dutch writers (Voet, Groenewegen and Vinnius) to find that they did support the view of *Mackay* and *Sparks*. Both the validity of the rule and its basis – the rebuttal of animus – were affirmed in the main opinion of what is generally regarded as the leading South African case on the status of veritas in the law of defamation. Seemingly for the first time, the phrase ‘public benefit’ was used to name that additional requirement which was needed, over and above truth, to justify the utterance of the defamatory words complained of under the actio iniuriarum. This became the settled position of the Cape of

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<sup>55</sup> Above, 4.

<sup>56</sup> De Villiers op cit note 16 at 99.

<sup>57</sup> *Sparks v Hart* (1833) 3 Menz 3.

<sup>58</sup> *Botha v Brink* 1878 Buch 118.

Good Hope, and no willingness to re-open the debate on the part of courts can be seen after that.<sup>59</sup>

[467] *Other territories*. The position of the Orange Free State<sup>60</sup> will be considered in the next section, since it produced the one judgment in the history of South Africa where truth simpliciter was recognised as a valid defence to an action in defamation.

As far as Transvaal is concerned, the first case where the defence was at stake appears to have been *Dunning v Quin* in 1905.<sup>61</sup> The judge referred in that case to the position of the Cape Supreme Court, mentioned the dissenting position of the High Court of the Orange Free State and then gave preference to the Cape position. When the issue resurfaced in *Stanley v Central News Agency* (1909),<sup>62</sup> the Cape position was affirmed without any discussion. Later in the year, the case of *South African Mails Syndicate v Hocking*<sup>63</sup> confirmed that view again, only substituting ‘public interest’ for ‘public benefit’.

There does not appear to have been any relevant case from Natal during its period as a separate colony.<sup>64</sup>

(ii) *After the Union of 1910*

In 1910 the four colonies of the Cape, Natal, Transvaal and Orange became the single Union of South Africa. The common law of South Africa technically became one and, on all matters where it was not already the same, the question was open as to which way the law would now go, even though a bias towards the Cape position was almost inevitable. Indeed, as far as the defence of truth is concerned, the law of the Cape Colony seamlessly became the law of the Union.

The newly established Supreme Court of South Africa had to confront the question within its first year of existence. In *Leibenguth v Van Straaten*,<sup>65</sup> De Villiers JP – Jacob de Villiers, Judge President of the Transvaal Supreme Court, not John Henry de Villiers, who

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<sup>59</sup> See *Meurant v Raubenheimer* (1882) 1 Buch 87; *Michaelis v Braun* (1886) 4 SC 205; *Graham v Ker* (1892) 9 SC 185; *Bloem v Zietsman* (1897) 14 SC 361; *Clarke & Co v St Leger* (1896) 13 SC 101.

<sup>60</sup> The question does not appear to have been considered between 1902 and 1910 ie between the annexation of the Orange Free State, which became the Orange River Colony, and the foundation of the Union.

<sup>61</sup> *Dunning v Quin and Others* 1905 TH 35.

<sup>62</sup> *Stanley v Central News Agency* 1909 TS 488.

<sup>63</sup> *SA Mails Syndicate v Hocking* 1909 TS 946.

<sup>64</sup> In *Oliver Ripton Daniel v Hugué R Denoon* (1897) 18 NLR 125, the debate about veritas was mentioned but the question left open.

<sup>65</sup> *Leibenguth v Van Straaten* 1910 TPD 1203.

had been Chief Justice of the Cape Supreme Court since 1873, and who had become the Chief Justice of the Republic –<sup>66</sup> reopened the question, albeit in an oblique way, because the question at hand was whether truth alone could be pleaded in mitigation of [468] damages (on which see below);<sup>67</sup> and he opined that, if he had to decide, he would be inclined to follow ‘the view of Voet and the Cape authorities’ that ‘public interest’ had to be pleaded additionally to truth.

That indeed the position of the Cape Colony was adopted by South Africa as a whole is difficult to deny, although interestingly an element of uncertainty continued to float for some time after the establishment of the Union. The Orange Free State Provincial Division of the Supreme Court declared the question open in *Van Wyk v Steyn* (1924)<sup>68</sup> and then in *Toerien v Duncan* (1932);<sup>69</sup> and the Appellate Division could be seen to have lent some authority to that position when, under the pen of Innes CJ, it wrote in *Sutter v Brown* (1926) of ‘assuming that truth apart from the element of public benefit is not in itself a complete defence’.<sup>70</sup> On the academic side, this doubt can be seen to surface until the seventh (and last) edition of *McKerron on Delict*.<sup>71</sup>

It is however difficult to see how this could be the case given that the defence was either stated or plainly assumed in a number of judgments, both at provincial level in *Patterson v Engelenburg* (1917),<sup>72</sup> *Kennedy v Dalasile* (1919)<sup>73</sup> and then *Verwoerd v Paver* (1943);<sup>74</sup> and more importantly at Appellate Division level, first two years after *Sutter v Brown* in *Johnson v Rand Daily Mails* (1928),<sup>75</sup> then in *South African Associated Newspapers*

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<sup>66</sup> On him see Girvin op cit note 51 at 119–21, E Kahn *Law, Life and Laughter* (1991) 41–5, A A Roberts *A South African Legal Bibliography* (1942) 356–7.

<sup>67</sup> Below, 23.

<sup>68</sup> *Van Wyk v Steyn* 1924 OPD 68 at 72, referring to *Preller v Schultz* op cit note 23: ‘it is ... unnecessary to enter upon the controversial point, so fully discussed in *Preller v. Schultz*, whether the defence need by the Roman-Dutch law prove anything more than the truth of the words complained of as being defamatory’.

<sup>69</sup> *Toerien v Duncan* 1932 OPD 141 at 142: ‘It is still an open question whether public benefit is a necessary element in the defence of justification in Roman-Dutch law. See *van Wyk v. Steyn*’ (De Villiers JP).

<sup>70</sup> *Sutter v Brown* 1926 AD 155 at 172.

<sup>71</sup> R G McKerron *The Law of Delict. A Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* 7 ed (1971) at 186 note 28. The same point was made in earlier editions. See also Amerasinghe op cit note 7 at 84.

<sup>72</sup> *Patterson v Engelenburg & Wallach’s Ltd* 1917 TPD 350 at 353: ‘In order to succeed on a plea of justification the defendant must prove truth and that it was for the public benefit’ (referring to Voet).

<sup>73</sup> *Kennedy v Dalasile* 1919 EDL 1 at 8–9: it is ‘self-evident’ that the defendant ‘must prove that the words spoken were true in substance and in fact, and that it was for the public benefit that they should be published’.

<sup>74</sup> *Verwoerd v Paver & others* 1943 WLD 153: the court mentioned (at 157) that it is certainly ‘in the public interest’ to publish the words complained of if they were true, which assumes that it is a requirement of liability.

<sup>75</sup> *Johnson v Rand Daily Mails* 1928 AD 190 at 204: ‘If ... the words are proved to be substantially true, and for the public benefit, no damages could be awarded’.

*v Yutar* (1969),<sup>76</sup> in *Mahomed v Kassim* (1973)<sup>77</sup> and – after the Appellate Division [469] became the Supreme Court of Appeal – in *Yazbek v Seymour* (2001)<sup>78</sup> and in *Independant Newspapers Holdings Ltd v Sullivan* (2004).<sup>79</sup> Assuming an element of slight doubt might have been plausible until 1928, it would not have been after that.

(b) *Rationale*

Why, then, did South African law settle on that position? This question can receive at least two sorts of answers, from the internal perspective of the legal system in question or from an outside perspective. Let us consider South African law's self-understanding first.

Perhaps the most striking thing, in this respect, is that the balance between authorities and policy considerations as possible sources appears throughout the history of South African law to be heavily skewed towards authority. In the earlier days, the question that dominated judgments was what the Roman-Dutch writers had to say on the question; later, what earlier judgments had decided. This is not to say that principled considerations did not appear, but they were secondary and offered as subsidiary reasons to back up the identified legal authorities. In one sense, of course, there is nothing surprising with that; courts are not meant to re-open questions on their merits each time they arise anew. However, the contrast is striking with English law, where much of the equivalent debate was carried out before the rule of precedent hardened in the 19<sup>th</sup> century, and a much greater willingness to engage with policy considerations can be seen on the part of courts.

The only South African case where a sustained attempt was made at justifying the position reached by the law is, perhaps unsurprisingly, the minority judgment in *Preller v Schultz* –<sup>80</sup> in other words, the one case where a judge was actually called upon to justify, in the face of opposition, the validity of the otherwise dominant rule in the South African colonies. Even so, it is interesting to note that the one policy argument put forward by Steyn J was the same one that English opponents to *veritas* have brought up time and again, to the

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<sup>76</sup> *South African Associated Newspapers Ltd and Another v Yutar* 1969 (2) SA 442 (A) at 452: 'That then [ie the truth of the statement], apart from public interest ... was what the appellants had to prove'.

<sup>77</sup> *Mahomed v Kassim* 1973 (2) SA 1 (RA) at 9: 'It must now, I think, be accepted as settled law that *Botha v. Brink* correctly states the defence of justification and that, in order for a defendant to succeed in this defence, he must show not only that what he said of the plaintiff was true, but also that what he said was for the public benefit'.

<sup>78</sup> *Yazbek v Seymour* 2001 (3) SA 695 (E). The defence is assumed throughout, eg at 698 and 701.

<sup>79</sup> *Independant Newspapers Holdings Ltd v Sullivan* 2004 (3) SA 137 at [34].

<sup>80</sup> *Preller v Schultz* 10 Cape LJ 175 (below, 23).

exclusion of virtually any other:<sup>81</sup> the fact that it is wrong to rake up (or, alternatively, *gratuitously* to rake up) the past offences of wrongdoers attempting to live down their earlier life.<sup>82</sup> Modern South African law has not self-reflectively explained why it has opted for the [470] defence of truth for the public benefit; essentially, it has been content to live on the authority of Paul as mediated by Roman-Dutch writers. This is certainly remarkable from a jurisdiction whose unique position at the crossroads of the world's two great traditions has given rise to such a prolific, and generally self-questioning, body of legal scholarship.<sup>83</sup>

(c) *Analysis*

As mentioned, this desire to let offenders live down their sinful past is a concern which – whether worthy of support or not – has to my mind nothing to do with the protection of reputation. It really is an attempt to protect the claimant's privacy, which itself is a species of *dignitas not fama*.<sup>84</sup> If this is true, then the position of South African law can be seen, like the one by which English law has oftentimes been tempted, as an attempt to bring other concerns than reputation into its law of defamation. This is naturally not surprising if one remembers the conceptual framework within which the South African law of defamation operates, namely, as part of the *actio iniuriarum*. As explained, in modern South Africa as in Roman law, the law of defamation is the law of *iniuria* as it applies to infringements of *fama*. It might be spoken of as a self-contained province of the law but it is not. Technically, what a claimant does when he sues 'in defamation' before a South African court is bring an *actio iniuriarum*.

This is bound to be significant because, the moment the action is framed as an *iniuria*, and more specifically – to use Roman law's own taxonomy – as an *iniuria verbis* (that is to say, an insult committed by words), a whole body of principles is brought into play that does not fit easily with the general principles of a 'law of defamation' – a later concept which has been *superimposed* onto the law of *iniuria*. If one thinks, as modern English law does, in

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<sup>81</sup> Descheemaeker op cit note 33 at 11ff.

<sup>82</sup> On this point, see also below, 26. Along the same lines, one could mention Mason J's argument in *Dunning v Quin and Others* op cit note 61 at 39 that the defence of truth simpliciter would 'afford a most undesirable encouragement and protection to the blackmailer' (cited in *Leibenguth v Straaten* op cit note 65 at 1207).

<sup>83</sup> This paragraph focused on courts; but the same imbalance can be seen in textbooks and other scholarly works. For instance, Jonathan Burchell's opus, the most detailed treatment of the law of defamation ever to have been written in the country, goes no further than stating the same idea according to which '[t]here comes a time when the ashes of the past must be left to die' (Burchell op cit note 13 at 210).

<sup>84</sup> Descheemaeker op cit note 33 at 17ff. The argument does not appear to have been made in the context of South African law. See however *Groenewald v Homsby* 1917 TPD 81 at 85, which comes close to it (citing judgment at first instance); also Burchell op cit note 13 at 210.

terms of the protection of deserved reputation, then *veritas* as a defence follows as a logical consequence; but if one thinks, as the Romans did, in terms of contumelious behaviour, then truth is *prima facie* irrelevant and will only bite when, coupled with an additional element, it becomes sufficient to negate the required mental element without which there can, by definition, be no contempt.<sup>85</sup>

The result of this logic is plainly to be seen in South African law until the [471] present day. The problem of South African law is that it has, at heart, a law of verbal injuries, which it has inherited from Roman law. Under the combined influence of Grotius and English scholarship, it later carved out a concept of defamation (*'iniuriae famae'*, as it were); but it left unaddressed the frictions caused by the fact that the two categories, while overlapping very significantly, are not the same. Most but not all defamations are verbal injuries; most but not all verbal injuries are defamatory. Moreover, they do not follow entirely the same logic. The question whether *veritas convicii excusat* exposes this tension, as it makes sense within one analytical framework but not the other: within a law of verbal injuries, truth is irrelevant in itself but can be part of the rebuttal of the necessary intention to insult; within a law of defamation understood as the protection of deserved reputation, it is an analytical necessity. But to what logic does the category of 'truth for the public benefit' answer? In itself, none that can be identified. If the purpose of the action is to protect the plaintiff's deserved reputation, it is too narrow. If the purpose is to protect his reputation whether deserved or not, or his privacy, it is too wide. If it is to redress contumelious behaviour, it is absence of *animus iniuriandi* – of which truth for the public benefit is only an imperfect approximation –<sup>86</sup> which should avail as a defence. The scope of the defence in the modern law belies the fact that South African law still thinks (if imperfectly) in terms of verbal injuries, not defamation. Thus, if it wants to move from the law of contumelious behaviour that it has inherited from Roman law to the law of injuries to reputation that it claims to be having, it will need to detach the protection of *fama* from the *actio iniuriarum* and, among other adjustments, work out the consequences of what this means in terms of the defence of justification.

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<sup>85</sup> Above, 5.

<sup>86</sup> Imperfect for the reasons noted above (at 8). It is important to note that, the defence (justification) of truth for the public benefit having ossified from the excuse of lack of *animus iniuriandi*, the latter has become irrelevant: the defendant will not fail in his defence, if indeed his words were true and objectively for the public benefit, even if he spoke out of an improper, evil or spiteful motive: see *Williams v Shaw* (1884) 4 EDC 105 at 148; Burchell *op cit* note 13 at 215–16 (with the caveat of *SA Mails Syndicate v Hocking* *op cit* note 63, where it was – puzzlingly – suggested that in some extreme circumstances an improper motive might defeat the defence of truth for the public benefit).



(3) *A dissenting strand: truth simpliciter*

While it is fair to say that the defence of truth for the public benefit has been the settled position of South African law since its very beginnings and that, while tested, it has never been seriously threatened or in danger of losing its position, it remains true that a dissenting strand can be heard or seen in the background, challenging in a variety of ways, not the domination, but the hegemony of the settled position. In that respect, South African law can interestingly be seen as a mirror image of English law, where the same sort of relationship between a dominant position and a minority group of dissenters [472] that refuses to rally could be observed – but with truth simpliciter swapping places with truth for the public benefit.

(a) *A judge-scholar and his posterity*

The dissent to the settled position of Roman-Dutch in the southern African colonies has essentially one name, that of Melius de Villiers,<sup>87</sup> younger brother to John de Villiers.<sup>88</sup> Melius was both a judge, having served on the High Court of the Orange Free State and then as Chief Justice of the State, and a scholar, most noted for his *Roman and Roman-Dutch Law of Injuries* (1899), a translation and commentary of Voet's own commentary on book 47 title 10 of the Digest. Voet's authority was naturally considerable in South Africa, and De Villiers' book quickly established itself as a work of reference with great authority of its own.<sup>89</sup> On the specific topic of truth in the law of iniuria, however, De Villiers was not afraid of standing in a minority of one. His book was in effect an all-out attack against the unwillingness of the law to recognise truth simpliciter as a defence to a defamation or a verbal injury.<sup>90</sup> As far as Roman law is concerned, he did not hesitate to write there that 'there can be no doubt that in Roman law as a general rule the truth of a statement which in itself would be defamatory if untrue, was a sufficient justification for its utterance'.<sup>91</sup> To this 'general rule' he only

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<sup>87</sup> On him see Girvin op cit note 51 at 114, E Kahn op cit note 66 at 45–6, A A Roberts op cit note 66 at 357.

<sup>88</sup> Above, note 66.

<sup>89</sup> Percival Gane spoke of it as 'a most admirable and spacious disquisition on the title': P Gane *The Selective Voet* (1957) 201.

<sup>90</sup> I use both terms even though they are not synonymous, because difficulties with the defence of veritas stem largely from the friction between them – see above, section 'analysis'. De Villiers does not appear to have identified the problem; and he certainly did not discuss it. His starting point had, following Voet, to be iniuria and, within iniuria, iniuria verbis; but in his commentary, he adopts the perspective of defamation throughout.

<sup>91</sup> De Villiers op cit note 16 at 103.

recognised one exception, which is when an ‘obligation of secrecy’ existed. (It can be doubted whether this ‘exception’ actually has anything to do with the law *of defamation*. It seems rather that, for De Villiers, truth always justified a defamatory statement but there were other legal principles that might forbid the speaking of true matters, which naturally no-one would deny.) On the authority of what he perceived to be the Roman law, he then dismissed the contrary position of Voet and, from there, went on to declare himself to be ‘justified in adopting [the rule] that, except where an obligation of secrecy exists, it is the absolute right of every person to speak the truth’.<sup>92</sup>

Having reached this position of principle, Melius de Villiers could then start explaining away contrary judgments from the Cape Colony, placing heavy reliance instead on a case from the High Court of the Orange Free State: *Preller v Schultz* (1892).<sup>93</sup> Perhaps surprisingly, the majority opinion of this judgment from a court which played a comparatively minor role in the shaping of South African law, and representing a very minoritarian position [473] in the land, was given the honour of being reproduced, despite its length, almost in extenso. (The minority opinion had no such luck.) Even more surprisingly, De Villiers did not see it apposite to inform his readers that the Chief Justice presiding over the High Court in that case was no other than his good self acting under another hat. The judgment – the only one in the history of South African law to have recognised truth simpliciter as a defence to an action for defamation or verbal injury –<sup>94</sup> develops on the same line of arguments as the book later would, heavier emphasis being however laid on policy grounds in order to supersede the views ‘so varying and divergent’<sup>95</sup> of Roman-Dutch writers. There is no need to engage with the substantive argument in the present context, except to point out that this judgment had no following beyond the veil of doubt that it cast upon the dominant position through much of the 20<sup>th</sup> century.<sup>96</sup>

#### (b) *Mitigation of damages*

Whereas, subject to the above caveat, truth simpliciter was never accepted as a good justification to an action in defamation, it is interesting to note that it was readily accepted as

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<sup>92</sup> De Villiers op cit note 16 at 108.

<sup>93</sup> *Preller v Schultz* op cit note 14.

<sup>94</sup> Same remark as above, note 90. De Villiers starts his judgment from the vantage point of the *actio iniuriarum*, but then switches to ‘character’, ‘good name’ and ‘fame’ as categories of reasoning.

<sup>95</sup> De Villiers op cit note 16 at 119.

<sup>96</sup> Above, 18.

a factor to be taken into account when it comes to quantum of damages: if the defendant had no reputation to speak of in respect of the incrimination complained of, damages will be reduced (to the discretion of the Court, although presumably they could not be brought down to nil). The leading judgment on the question is the case of *Leibenguth v Van Straaten* in 1910, where Bristowe J declared that ‘a man of bad character has not so much to lose as a man of good character’. De Villiers JP opined that ‘although truth would not be a sufficient justification, it can be pleaded in mitigation of damages’. ‘To my mind’, he added, ‘that is perfectly sound’.

I would however submit that it is not. Bristowe J’s reasoning proves, in effect, either too much or too little. If one accepts that damages in defamation are meant to compensate reputation in so far as it deserved – on the particular point at stake – then a man who was truthfully injured in his fama (in the wider sense) should receive no damages *at all*, for he has lost nothing that is legally protected. This would be tantamount to recognising truth simpliciter as a defence. But, as was seen,<sup>97</sup> the position that truth is not in itself a defence is by construction the reverse side of the proposition that defamation protects reputation *whether deserved or not* (at least prima facie, there can exist justification or excuses). It is difficult to see how, in logic, there could be a middle ground between these two positions: either the law of defamation protects reputation simpliciter, in which case – unless a defence applies – the man of ‘bad character’ will receive the ordinary [474] quantum of compensation for the injury caused by the publicity given to his wrongdoing through the publication of the statement; or it protects reputation grounded in character, and then he will receive nothing. There does not appear to be any coherent analytical basis on which he could receive something in between.<sup>98</sup>

This stance taken by the law on mitigation of damages, which we might want to describe as ‘pragmatic’, reveals to my mind that South African law is unable to live up to its own logic. It does not want to recognise truth simpliciter as a defence, out of a (prima facie laudable) attempt to protect people against the malicious or gratuitous injury that could be

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<sup>97</sup> Above, 7.

<sup>98</sup> This point might be worth emphasising since it is counter-intuitive. Even someone who is happy with the proposition that defamation protects reputation in the wider sense (i.e. whether deserved or not) is likely to consider that the non-thief who has been called ‘a thief’ has lost more than the actual thief. While it is possible that this would be true in terms of non-reputational interests (for example privacy), it is incorrect as far as reputation is concerned. The loss – that is to say the diminution, or potential diminution, of one’s esteem in the eyes of the community – is the same in both cases. (Two complications arise here, but they both cut across the divide between true and false incriminations: one is that the extent of the injury will depend on how plausible the alleged facts are; the other is the extent to which these facts might already be known within the community.) The reason why the point presently made is not readily accepted is that we cannot accept that the truth of the defamatory statement would really be indifferent – that is to say, we cannot escape the proposition that defamation ought to protect deserved reputation, even when, de lege lata, the law takes a different stance.

made to their reputation – a form of enforced forgiveness on the part of the community, at least in the external for –; yet it cannot accept the natural consequence of this position, which is that wrongdoers might receive money damages from even good-faith members of the community who would disclose their wrongdoing outside the objective boundaries of public interest. An English author had put the same concern more bluntly when he spoke of ‘mak[ing] a profit of [one’s] bad fame’.<sup>99</sup> The position of Roman-Dutch law is coherent (if ultimately wrong in my mind); but the position of South African law on mitigation of damages seems to give away the fact that it is practically untenable. This can be seen as an indirect vindication of the defence of veritas.

(c) *The meaning of ‘public benefit’*

One point which has not been given much thought in the debate, perhaps because it is obvious and what is obvious tends to be overlooked even when it is important, is that the scope of the defence of truth for the public benefit depends on the breadth of, and therefore the meaning given to, the concept of ‘public benefit’. It is easy to see that, the broader the concept of public benefit is defined, the broader the defence becomes and the closer it will get to the defence of truth simpliciter. At the extreme, if anything uttered was [475] considered to be ipso facto for the public benefit, then the categories of ‘truth of the public benefit’ and ‘truth’ would, in fact, coincide. The point is all the more important because ‘public benefit’ is not a category that most people would readily understand in a similar way. It has little intrinsic meaning; in fact, it is difficult to think of a legal construct which has a wider range of plausible understandings.

This is not the place to engage into an in-depth examination of the content of the notion of ‘public benefit’ (or ‘interest’) in South African law; but a few remarks can profitably be made. The first one is that the concept has never been defined in South African law, either by courts or scholars. The inquirer who turns to cases and textbooks to find out more will typically be greeted with the rather unhelpful proposition that what amounts to public benefit is a question of fact that is highly dependent on all the circumstances of the case.<sup>100</sup> Beyond that, what might be given is a list of situations where facts have been held to

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<sup>99</sup> ‘Least of all will [the law] allow such a person *lucrari ex mala fama*,—to make a profit of his bad fame’ (F Holt *The Law of Libel* 2 ed (1816) 271).

<sup>100</sup> Eg Neethling op cit note 49 at 166 (‘Generally public interest in a defamatory remark will depend on the circumstances of each case as well as the convictions of the community (*boni mores*) at that particular time’); *Mahomed v Kassim* op cit note 77 at 9 (‘In deciding whether what was said was for the public benefit all the

be, or not to be, in the public interest.<sup>101</sup> (Interestingly, the example most frequently advanced in both types of literature of matter which is *not* for the public benefit is the raking up of past offences:<sup>102</sup> this is the very same example that has been brought up, time and again, by opponents to *veritas* in the English debate.)<sup>103</sup> Litigation on this point has been in fact remarkably scarce before the higher courts. When issues relating to the defence of truth for the public benefit come up, it is usually around the first limb that debates revolve. The cases concerning the defence often involve the recent criminal conduct of an individual or the [476] behaviour of clearly public figures, about which there would be little scope for argument on the ‘public benefit’ part of the test.

The second remark is that, while the requirement of public benefit clearly has some bite, in that defendants do fail on this account, the dominant impression when one tries to infer general principles from casuistic case law is that the bite is limited. This is reflected in *Gronewald v Homsby* (1917),<sup>104</sup> perhaps the only case before the Supreme Court where there was an argument – not within the court, but at a distance with the view taken at first instance – around what constitutes public interest or benefit. A man had committed adultery, in a small settlement, with a woman whose husband was away. The defendant, a close friend of the husband, complained to the superintendent. The facts were admitted to be true by both parties; but was their disclosure in the public interest? At first instance, the magistrate held that they were not because the plaintiff did not have a public position and lived privately. This was reversed in the Supreme Court, which obviously held to a wider understanding of public benefit, albeit in no clear way. One judge mentioned that, although the claimant was a private man, his adultery was public and the defendant had therefore acted in ‘good faith’ in reporting

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circumstances surrounding the publication must be taken into account’); *Van Wyk v Steyn* op cit note 68 at 71 (‘the question whether a particular thing is in the public interest is not a question of law but a question of fact, which can hardly be determined by appealing to *Voet* or to any other authority. It falls to be determined by reference to conditions and circumstances which vary from century to century and from country to country’); *Stanley v Central News Agency* op cit note 62 at 491 (‘It would be impossible to give an exhaustive statement of the subjects which a court would hold to be of public interest, and it is not desirable to endeavour to do so. Obviously such a list must change from time to time, according to the changing conditions of society and the circumstances’).

<sup>101</sup> The most complete, if now outdated, overview of authorities is provided in ARB Amerasinghe *Defamation in the Law of South Africa and Ceylon* (c 1969) Ch 31. See also Neethling op cit note 49 at 154–5.

<sup>102</sup> Eg Neethling op cit note 49 at 154; *Graham v Ker* op cit note 59 at 187. This might need to be limited, as in England, by an additional factor – perhaps the non-gratuitousness of the disclosure. Thus, in *Patterson v Engelenburg* op cit note 72 at 361, Wessels J opined that ‘a scandal cannot be raked up unless it is done for the public benefit’, suggesting that it is in fact possible for a past transgression to be revived in the interest of the community. If we accept that public benefit is very largely a mirror image of lack of malice, this is essentially the position of England after the Rehabilitation of Offenders Act (above note 43).

<sup>103</sup> Descheemaeker op cit note 33 at 11ff.

<sup>104</sup> *Gronewald v Homsby* op cit note 84.

it (thus reintroducing considerations of animus within the defence);<sup>105</sup> another simply held that in the face of such ‘gross immorality’ the defendant had been ‘justified’ in making the defamatory statement;<sup>106</sup> as to the last, he opined that, even though disclosing immorality would not qualify per se as being for the public benefit, it was, in that particular case, ‘in the interest of that little community that things like this should not happen’ (the idea presumably being that disclosing the facts would go towards bringing the adulterous relationship to an end). Reading between the lines, the requirement of the court seems to be that there should be a ‘good reason’ to speak, whether that good reason be the fact that the disclosure of the fact was not pointless – objective justification – or that it was not malicious – subjective excuse. In one word, perhaps, that it should not be *gratuitous* (or vexatious). This is a hurdle to jump for the defendant, but a comparatively low one.

Significantly for the present argument, there is at least one line of thinking that favours an even lower hurdle and thus, mechanically, an even greater proximity as defences between truth ‘for the public benefit’ and truth simpliciter. It is best exemplified in the suggestion, which has been described as the ‘locus classicus’<sup>107</sup> of the law relating to the defence of truth, that Lord de Villiers CJ made in *Graham v Ker*: ‘As a general principle’, he wrote, ‘I take it to be for the public benefit that the truth as to the character or conduct of individuals should be known’.<sup>108</sup> (He then went on to carve out an exception[477] to that general principle, namely, the ‘unnecessary revival of forgotten scandals’.) Behind an opposite starting point, this is in fact strikingly close to the position of English law. In that sense, John de Villiers’ position could be regarded as a challenge to the traditional position of Roman-Dutch law as effective as that of his brother Melius attacking the very nature of the defence. While John de Villiers’ position cannot be said to represent the law of South Africa, it remains true that both this line of thinking and the generally low hurdle which the requirement lays before defendants trying to avail themselves of the defence represent a challenge to the traditional position of Roman-Dutch law and its underlying justification. It is, perhaps, another indirect vindication of veritas.

#### IV CONCLUSION

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<sup>105</sup> At 85 (see also above, 4).

<sup>106</sup> At 84.

<sup>107</sup> *Mahomed v Kassim* op cit note 77 at 9 (Beadle CJ).

<sup>108</sup> *Groenewald v Homsby* op cit note 84 at 187.

South African law settled early on the Roman-Dutch position that, in an action for injury to reputation, the truth of the defamatory allegation would not justify apart from an element of ‘public benefit’. This has remained the law until the present day. Interestingly, however, that – undefined – element of public benefit has been rather loosely construed, and truth simpliciter has been allowed to be pleaded in mitigation of damages, the combined effect of which being to give, in practice, a foothold to the defence of veritas. The epigraphed sentence at the start is emblematic of this discreet but real foray made by the defence of truth simpliciter in South African law. English law, on the other hand, recognised the validity of the plea of veritas as early as the 16<sup>th</sup> century but was never entirely satisfied with its own position and, in the end, partially gave in to accommodate what had long been the main criticism framed by opponents to the sufficiency of truth, namely, that former wrongdoers should be allowed to live down their past. Thus, when looking at South African and English law on the question of what justifies a defamatory statement, we find ourselves in the situation, not unfamiliar to the comparatist, of two legal systems starting from opposite premises but each moving, below the surface, towards the position of the other, ending up with not so dissimilar positions. This prompts the conclusive question of this article: if the dominant strand of South African law is unquestionably rooted in Roman law through Roman-Dutch commentators, can its ‘dissenting strand’ be attributed to English influences?

One always has to be cautious when examining intellectual genealogies, for influences and, even more so, the lack thereof are very difficult to prove or disprove. But what one can say after having examined the facts is that, on this particular issue, there is no good evidence of borrowing – in either direction. While it is transparent when reading the cases that the conflicting position of English law was known and appreciated, there are few documented attempts on the part of counsel to introduce it into the law of the land; and these never prospered. Reliance remained heavily on Roman-Dutch sources; and there is no sense that this would be no more than lip service. As to the leading opponent to the Voetian position, [478] he was exclusively educated in South Africa and would go on to become Professor of Zuid-Afrikaansche Recht in Leiden.<sup>109</sup> His brother John did spend a stint in England, being called to the bar by the Middle Temple; and it is true that he has often been charged with unduly borrowing from English sources.<sup>110</sup> Influence is therefore not to be ruled out; at the same time, the fact that others had the same inclination without any English tropism, while no

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<sup>109</sup> Girvin op cit note 51 at 114. Leiden is the very place where Voet had studied.

<sup>110</sup> See eg Girvin op cit note 51 at 120.

similar challenge was posed by many judges educated – at least in part – in England, means that it would be imprudent to infer a link.

Generally, in a context of what was at times an extreme tension between proponents of the ‘pure’ Roman-Dutch law and those of the Anglicisation of the Colony, between Afrikaans- and English-speaking scholars, judges and seats of learning, it is if anything the remarkable *isolation* of the truth debate from these tensions that should be noted. We do not find the sort of dividing line, let alone battleground, that we might have expected to find; and the minoritarian dissenting strand that was highlighted does not appear to be explainable on this sort of basis. In South Africa, as in fact in a mirrored way in England, we find two camps with two broadly coherent positions; in both cases, we have a majority imposing its position early on, and a minority that never manages to reverse the status quo yet does not give up and obtains some concessions from the other party. But, just as it would seem absurd to describe English law as a mixture of the ‘pure’ common law and civilian thinking because of Fitzjames CJ<sup>111</sup> and the Rehabilitation of Offenders Act,<sup>112</sup> so it appears rather misguided to speak of South Africa as a mixed legal system on this particular point. Rather, there is in both jurisdictions an – unhappy – coming together of two principled positions; but these are philosophical positions, in particular on the value of truth and that of oblivion, rather than emanations from two legal traditions (even if it is true that, historically, these have dovetailed into one another). While neither system is entirely satisfied with its own position, and tensions are visible in both, South African law has remained firmly committed to the choice made two thousand years ago by the Romans: *veritas convicii non excusat*.

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<sup>111</sup> Above, note 39.

<sup>112</sup> Above, note 43.